IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 22nd May, 2024
% ***Pronounced on:29th July, 2024***

\+ **CS(OS) 1459/1995 & I.As.24/2003, 8345/2024**

M/S. YASHNA EXPORTS P.LTD.
Having registered Office at,
H-15, Maharani Bagh,
New Delhi .... Plaintiff

Through: Mr. Sanjeev Sindhwani, Sr. Advocate with Mr. Sanjay Dua & Ms. Vansha Suneja, Advocates.

versus

RAISINA BHATIA
W/o Shri Brij Narain Bhatia,
R/o 21A, Tughlak Road,
New Delhi ..... Defendant

Through: Mr. Sachin Puri & Mr. J.S. Bakshi, Sr. Advocates with Mr. Praveen K. Sharma, Mr. Harsh Priya, Ms. Shweta Arora, Ms. Ilma Iqbal, Mr. Asbakshi & Mr. N.S. Bakshi, Advocates.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

I.A. 6501/2024 *(u/S 151 of CPC, 1908)*

1. By way of present application, the Applicant/Om Prakash Arora seeks to set aside/recall the Judgment and Decree dated 20.09.2002 passed in the

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present Suit.

2. Briefly stated the facts of the present Suit were that the Property No. 21 and 21A, Tughlaq Road, New Delhi *(hereinafter referred to as the* "suit property"*)* was acquired by one Smt. Chandnee Widya Madden by way of a Perpetual Lease Deed dated 03.12.1957 from the Land and Development Office *(hereinafter referred to as* "L&DO"*)*. After her demise, she was survived by her four daughters, namely, Smt. Meenakshi Sardana, Smt. Raisina Bhatia, Smt. Sheila Chaithli and Ms. Prem Madden and one son, Shri Santosh M. Madden. In a Judgment and Decree dated 13.01.1975, it was declared that the suit property shall devolve upon her four daughters to the extent of 25% undivided share each. Ms. Prem Madden was unmarried and died intestate on 11.01.1988 leaving her three sisters and one brother as the only legal heirs who all inherited 6.25% undivided share each out of her 25% undivided share in the suit property. Her brother, Shri Santosh M. Madden, therefore, became the owner of undivided share to the extent of 6.25% share. While the other three sisters became owners of undivided share to the extent of 31.25% share each in the suit property.

3. Shri Santosh M. Madden died intestate on 09.12.2006 and his undivided share was inherited by his wife, Smt. Rajamma S. Madden, who entered into to an Agreement to Sell dated 19.10.2013 in respect of her 6.25% share in the suit property in favour of the applicant/Om Prakash Arora herein and received the entire sale consideration. Smt. Rajamma S. Madden handed over the symbolic possession of the suit property to the applicant/Om Prakash Arora. Smt. Rajamma S. Madden also left behind her last Will and Testament dated 23.10.2013 which is a registered document, wherein she confirmed the Agreement to Sell and bequeathed her share in

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the suit property in favour of the applicant/Om Prakash Arora. Smt. Rajamma S. Madden died on 07.12.2023, and the applicant/Om Prakash Arora has, therefore, become owner of 6.25% of the undivided share in the suit property.

4. Shri K.P.R. Nair was named as the sole Executor in the Will behind by Late Smt. Rajamma S. Madden who filed a petition for grant of probate with the copy of the Will annexed which was allowed and the probate was granted. After being satisfied, learned Court of the Additional District Judge, New Delhi, Patiala House Courts, New Delhi discharged the Executor *vide* Order dated 04.09.2015. However, subsequently, the separate applications were filed by Smt. Meenkashi Sardana and legal heirs of Late Smt. Sheila Chaithli against the grant of probate which was allowed *vide* Order dated 30.05.2023 and the Probate dated 25.11.2014 was revoked in respect of the estate of Late Smt. Rajamma S. Madden. The named Executor of the Will filed the Appeals before this Court *vide* FAO No. 288/2023 and FAO No. 290/2023 which are pending disposal. Upon the refusal of the co-owners to partition the suit property, the applicant/Om Prakash Arora filed the Civil Suit bearing No. 162/2020 for Partition and Injunction against three sisters, namely, Smt. Meenakshi Sardana, Smt. Raisina Bhatia and Smt. Sheila Chaithli. An *ex pate status quo* Order was granted by this Court *vide* Order dated 07.07.2020 in regard to the Title and Possession of the suit property. Though it was later vacated *vide* Order dated 28.07.2022. However, in the Appeals, FAO(OS) 94/2022 and also FAO(OS) 136/2022 *vide* Orders dated 30.08.2022, the parties i.e., the plaintiff herein and the defendant Nos. 1 to 4 and Smt. Meenakshi Sardana were directed to maintain *status quo* in respect of the suit property. During the pendency of

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the Suit, Smt. Raisina Bhatia and Smt. Sheila Chaithli had since died and the applications had been filed for substitution of the legal heirs respectively.

5. The plaintiff in the Suit, including Smt. Kailash Suneja (Since deceased) filed an application for their impleadment on the basis of Agreement to Sell dated 07.01.1994 and a Compromise Decree dated 20.09.2002. During the pendency of the said application, Smt. Kailash Suneja expired and the plaintiff No. 4 herein became her legal heir and *vide* Order dated 08.04.2022, the said applicants were allowed to be impleaded as defendants in the Civil Suit No. CS(OS) 162/2020. The said Suit for Partition is pending adjudication.

6. It is asserted that the suit property was undivided property and Smt. Meenakshi Sardana, Late Smt. Raisina Bhatia and Late Smt. Sheila Chaithali each having undivided equal share of 31.25% and the applicant/Om Prakash Arora owns 6.25% undivided share in it. The plaintiff in the present case claimed to have purchased 31.25% undivided share from Late Smt. Raisina Bhatia. However, no Sale Deed has been executed in the name of the plaintiffs till date. The plaintiffs, including Late Smt. Kailash Suneja filed an Execution Petition bearing EX.P. No. 399/2014 which is still pending adjudication. The applicant/Om Prakash Arora has already filed the Objections in the said EX.P. 399/2014 raising numerous grounds and also has filed the application for stay of the operation of the Order dated 30.11.2023 passed in the Execution Petition. In view of the objections raise by the applicant/Om Prakash Arora, counsel appearing for the Decree Holder was constrained to make a statement that no further steps shall be taken till the next date of hearing pursuant to the Order dated 30.11.2023. The Execution Petition and the Objection are still pending adjudication.

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7. It is submitted that the Judgment and Decree dated 20.09.2002 had been based not on merits but in view of the compromise *inter se* the parties. The Court at the time of passing of the Judgment and Decree dated 20.09.2002 did not go into the merits of the case or into the settled legal position that the outsider could not be given possession of any portion of the undivided property as all the co-owners were owners and in possession of every inch and corner of the undivided property. The Court, while recording the compromise and passing a Decree, failed to take into account the interest and rights of other co-owners. It also failed to take into consideration that at the request of the plaintiffs, the defendants, Smt. Raisina Bhatia was made to execute a registered General Power of Attorney dated 17.09.2002/20.09.2002 and also a Special Power of Attorney in favour of Smt. Veena Suneja (representative of the plaintiffs) in respect of 31.25% of undivided share of the suit property, including the right to execute the Sale Deed.

8. It is claimed that the obligations fastened on the basis of alleged Agreement to Sell dated 07.01.1994 upon the plaintiffs are being illegally sought to be fastened on the defendant/Judgment Debtor by way of a clever move as the fraud has been played even upon the Office of the L&DO by getting the mutation done in favour of a dead person, namely, Smt. Prem Madden who had already expired well before the application for mutation was submitted with L&DO and by way of clever design, the Decree Holder made it possible illegally, unlawfully and contrary to the terms and condition of the alleged Agreement to Sell dated 07.12.1994 and further responsibilities are fastened upon the legal heir who has been appointed in execution proceedings so that the L&DO is erroneously persuaded into

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thinking that there is a mandate from the Court to the L&DO to grant all permissions in the matter when the plaintiffs/Decree Holders are not entitled thereto due to the fraud played by the parties to the Suit as recorded in the records of L&DO. It is submitted that the Compromise Deed is not lawful and *bona fide*. It is, therefore, submitted that the impugned Judgment and Decree dated 20.09.2002 has been obtained by fraud and suppression of material facts and is, therefore, liable to be set aside.

9. **The plaintiffs/non-applicants herein filed their Written Submissions**, wherein it has been argued that the applicant/Om Prakash Arora is a stranger to the family. Applicant/Om Prakash Arora claims to have purchased 6.25% share in the suit property from one of the co-owners, Smt. Rajamma S. Madden in the year 2013 and has filed the Civil Suit bearing No. CS(OS) 162/2020 for Partition, impleading dead persons, where an *ex parte* injunction so granted has already been vacated *vide* Order dated 28.07.2022. In the said judgment, it has been held that he is neither in actual or constructive possession of the suit property. Furthermore, the applicant/Om Prakash Arora asserted his rights on a Probate dated 25.11.2014 which has since been revoked *vide* Order dated 30.05.2023.

10. On the other hand, the Decree which is impugned by the applicant/Om Prakash Arora was Compromise Decree dated 20.09.2002 confirming the rights of the plaintiffs in an Agreement to Sell dated 07.01.1994. The co-owner, Smt. Raisina Bhatia had agreed to sell her 31.25% share in the suit property to the plaintiffs which the applicant/Om Prakash Arora has no concern. The applicant's claim of 6.25% share is from another co-owner Smt. Rajamma S. Madden and not from Smt. Raisina Bhatia who is the predecessor-in-interest of the plaintiffs. There is no *locus*

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standi of the applicant/Om Prakash Arora to challenge the Decree.

11. It is further asserted that none of the co-owners, including applicant/Om Prakash Arora's predecessor-in-interest ever challenged the Decree which has become final and binding. The applicant/Om Prakash Arora's lacks any right to challenge the impugned Decree. Furthermore, the plaintiffs have asserted that the present application is barred by limitation. The Decree is of 2002 which is sought to be challenged in the year 2024. The applicant's predecessor-in-interest never got challenged during the period of limitation and the applicant/Om Prakash Arora who at best has stepped into her shoes, cannot claim fresh commencement of limitation upon his alleged purchase or knowledge. The subsequent transfer cannot result in a restart of limitation period.

12. It is claimed that faced with this situation, the applicant/Om Prakash Arora, as a desperate measure, has taken recourse to Section 44 of the Transfer of Property Act *(hereinafter referred to as* "TPA"*)*. This provision, however, is not applicable for the simple reason that the applicant/Om Prakash Arora is a stranger to the family and an outside purchaser. He is not a member of the family which is the pre-requisite to invoke Section 44 of TPA. This provision is meant to ensure that no stranger intrudes into family privacy which obviously is not applicable to the applicant. The judgment in *Dorab Cawsji Warden vs. Coomi Sorab Warden and Ors.,* (1990) 2 SCC 117 relied upon by the applicant/Om Prakash Arora is not applicable as in that case, the Suit for Injunction was filed by a member of the undivided family.

13. In the end, it is argued that the plaintiffs' possession of a portion of suit property, cannot be objected to by any of the co-owners. Furthermore,

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the applicant/Om Prakash Arora has not been able to show that the suit property is being exclusively used by undivided family as their dwelling house. In fact, the part of the suit property is on rent. No family member has come forward with a plea of Section 44 of TPA. The applicant/Om Prakash Arora's attempt to invoke the said provision, is completely misconceived.

14. **The Written Submissions have also been filed on behalf of the applicant/Om Prakash Arora** who has stated that Section 44 of TPA is an absolute bar on transfer of possession of a dwelling house belonging to an undivided family by a co-owner to a person who is not a member of the family. In view of this specific bar contained under Section 44 of TPA, the compromise entered into between the plaintiffs and the defendant was aimed at defeating the provision of law and, therefore, the compromise so entered into was void under the Indian Contract Act and no Compromise Decree could have been passed pursuant to the compromise.

15. Reliance has been placed on the decision in *Dorab Cawasji Warden*, (supra), wherein the Supreme Court has observed that the possession of a dwelling house belonging to an undivided family cannot be transferred to a person who is not a member of the family.

16. The plaintiff/Decree Holder had filed a Suit in the year 1995 for Specific Performance of an Agreement to Sell dated 07.01.1994 executed by the defendant, Late Smt. Raisina Bhatia, whereby she agreed to sell her 31.25% undivided share in the suit property. The Compromise Decree dated 20.09.2002 was passed after seven years of filing of the Suit. It is a judicial imprimatur as illegal transfer of possession of a dwelling house belonging to an undivided family has been transferred to the plaintiff who was an outsider. The applicant/Om Prakash Arora claims to be an owner of 6.25%

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share in the suit property having acquired through Smt. Rajamma S. Madden *vide* Agreement to Sell dated 19.10.2013 and registered Will dated 23.10.2013. This 6.25% share of the applicant/Om Prakash Arora in the suit property is separate and independent of 31.25% share of the Decree Holder in the suit property. The applicant/Om Prakash Arora has further contended that since all other owners/legal heirs who were the other owners of the suit property who formed the undivided family were not arrayed by the Decree Holder as a party to the present Suit, it cannot be claimed that the family acquiesced or waived of their objection to the transfer of possession in the dwelling house by Late Smt. Raisina Bhatia in favour of the Decree Holder.

17. In so far, as the delay of 22 years in moving the present application is concerned, it is explained that the applicant/Om Prakash Arora or his predecessor-in-interest were not aware of the passing of Compromise Decree dated 20.09.2002 and he gained knowledge for the first time on 08.04.2022 when I.A. No. 3352/2021 was allowed by this Court in the Civil Suit bearing CS(OS) 162/2020. The present application has been filed within three years of knowledge in accordance with Article 137 of the Limitation Act.

18. Furthermore, it is a settled position in law that illegality howsoever old cannot metamorphose into legality and therefore, the plaintiffs cannot seek refuge under lapse of more than 22 years after passing of the decree for a prayer to set it aside.

19. It is further argued that the suit property has four bungalows belonging to undivided family of the predecessor-in-interest of the applicant/Om Prakash Arora, out of which two bungalows were rented out and remaining two bungalows were in occupation of Smt. Raisina Bhatia

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and Smt. Meenakshi Sardana each. It is the bungalow which was with Late Raisina Bhatia, possession of which has been illegally handed over to the plaintiff in violation of Section 44 of TPA.

20. It is asserted that the applicant/Om Prakash Arora is not in actual physical possession of any part of the suit property but only has symbolic possession thereof.

21. It is further submitted that the applicant/Om Prakash Arora has filed the Application bearing E.A. No. 1695/2023 in Execution Petition No. 399/2014, wherein the execution of the Compromise Decree dated 20.09.2002 has been stayed on the application of the applicant/Om Prakash Arora herein.

22. It is also submitted that the applicant/Om Prakash Arora is on a better footing than the plaintiff as he is the beneficiary under the registered Will dated 23.10.2013 and Agreement to Sell dated 19.10.2013. While the plaintiff's claim is based on the Agreement to Sell dated 07.01.1994.

23. It is argued that the suit property is still undivided and the Suit for Partition filed by the applicant/Om Prakash Arora is still pending whereafter only the suit property can be divided by metes and bounds or in the alternative by sale.

24. It is contended that the Decree has not been passed on merits but on the basis of compromise between the co-owners of the undivided dwelling house and this Court had no occasion to examine the case on merits.

25. In the end, it is argued that the Decree has been secured by practicing fraud and the same is, therefore, liable to be set aside.

26. **Submissions heard.**

27. To understand the background in which the present application has

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been filed by the applicant/Om Prakash Arora, it is pertinent to reiterate that there were four co-sharers of the suit property i.e., Ms. Prem Madden, Ms. Raisina Bhatia, Ms. Sheila Chaithli and Ms. Meenakshi Sardana. Ms. Prem Madden died issueless on 11.01.1988 and her 25% share had got equally divided amongst three sisters and one brother, Mr. Santosh M. Madden to the extent of 6.25%. On the demise of Mr. Santosh M. Madden on 09.12.2006, his wife, Smt. Rajamma S. Madden succeeded his 6.25% undivided share in the suit property. Ms. Raisina Bhatia had entered into an Agreement to Sell dated 07.01.1994 with the plaintiff/Aashna Exports and the Suit for Specific Performance and Possession got filed by the plaintiff which was decreed under Order XXIII Rule 3 of the Code of Civil Procedure, 1908 on the basis of the compromise between the parties *vide* Decree dated 20.09.2002. Pertinently, there were four shareholders and one of the shareholder of 31.25% had agreed to sell her property to the plaintiff way back in January, 1994 which ultimately fructified into a Compromise Decree dated 20.09.2002. The Execution Petition No. 399/2014 in respect of this Decree came to be filed by the plaintiff seeking directions to be issued to the defendant/Judgment Debtor to execute the Sale Deed in favour of the plaintiff. Pertinently, Mr. Santosh M. Madden who inherited 6.25% share from his sister, Ms. Prem Madden who died on 11.01.1988 and the share of Mr. Santosh M. Madden, who died on 09.12.2006, was inherited by his wife, Smt. Rajamma S. Madden. She during her lifetime entered into an Agreement to Sell dated 16.10.2013 with the present applicant/Om Prakash Arora in respect of undivided share of 6.25% in the suit property.

28. From the narration of facts, it is quite evident that the plaintiff had acquired 31.25% share which was independent of 6.25% share acquired by

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the applicant/Om Prakash Arora herein by virtue of Agreement to Sell dated 19.10.2013. Though both the shares form part of the same suit property but they are distinct share and one does not overlap with that of the other. Interestingly, the applicant/Om Prakash Arora entered into the Agreement to Sell dated 19.10.2013. While the plaintiff had entered into Agreement to Sell with Ms. Raisina Bhatia way back on 07.01.1994 which had finally culminated in a Compromise Decree dated 20.09.2002. The rights, if any, have been acquired by the applicant/Om Prakash Arora much later than the plaintiff's. The applicant/Om Prakash Arora can only assert his rights in respect of his undivided 6.25% share which has no concern with the undivided share of 31.25% share which has been acquired by the plaintiff by virtue of the assailed Decree. Though the applicant/Om Prakash Arora is claiming that the said Decree has been obtained fraudulently but he has not been able to explain any facts from where it may be inferred that there was any kind of fraud committed by the plaintiff or the defendant in the Suit therein. An empty plea of fraud has been taken which has no feet to stand on.

29. It is also significant to mention that the applicant/Om Prakash Arora in respect of his Agreement to Sell dated 19.10.2013 has already filed a separate Suit for Specific Performance and Possession. The rights of the applicant/Om Prakash Arora are absolutely independent any in no way his rights are impacted by the Compromise Decree.

30. The applicant/Om Prakash Arora has taken a plea that the possession could not have been acquired by virtue of Section 44 of TPA which states clearly that when the property is held by the undivided family, the possession cannot be handed over to the stranger.

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31. It is again relevant to highlight that the whole suit property contains four bungalows and independent bungalow was in possession of Ms. Raisina Bhatia, predecessor-in-interest of the plaintiff. Ms. Raisina Bhatia having an independent possession of the part of the suit property, cannot be said to be in a joint undivided household with the other legal heirs and the co-owners of the suit property.

32. Significantly, the applicant/Om Prakash Arora himself is a stranger and is seeking specific performance/possession in respect of 6.25% of undivided share in any of the four bungalows which are independently held by the plaintiff, Ms. Meenakshi Sardana and the other two bungalows are on rent.

33. There is no common occupation and there cannot be any disruption of the undivided household which is protected under Section 44 of TPA.

34. The judgment in the case of *Dorab Cawasji Warden*, (supra) relied upon by the applicant/Om Prakash Arora is not applicable to the facts in hand.

35. The present application is not only totally unfounded but is an endeavour to defeat the *bona fide* claims of the plaintiff which had acquired under the Agreement to Sell in 1994 which got finalised by a Compromise Decree in 2002.

36. In view of the foregoing discussion, there is no merit in the present application, which is hereby dismissed, along with pending applications, if any.

(NEENA BANSAL KRISHNA)
JUDGE

JULY 29, 2024/*S.Sharma*

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